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6 and USF&G, Defendants

7 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

8 UNITED STATES OF AMERICA for the)
use of NORTH STAR TERMINAL &)
9 STEVEDORE COMPANY, d/b/a NORTHERN)
STEVEDORING & HANDLING, and NORTH)
10 STAR TERMINAL & STEVEDORE COMPANY,)
d/b/a Northern Stevedoring &)
11 Handling, on its own behalf,)

No. A98-009 CIV (HRH)

12 Plaintiffs,)

13 and)

14 UNITED STATES OF AMERICA for the)
use of SHORESIDE PETROLEUM, INC.,)
15 d/b/a Marathon Fuel Service, and)
SHORESIDE PETROLEUM, INC., d/b/a)
16 Marathon Fuel Service, on its own)
behalf,)

17 Intervening Plaintiffs,)

18 and)

19 METCO, INC.,)

20 Intervening Plaintiff,)

21 vs.)

22 NUGGET CONSTRUCTION, INC.; SPENCER)
ROCK PRODUCTS, INC.; UNITED)
23 STATES FIDELITY AND GUARANTY)
COMPANY; and ROBERT A. LAPORE,)

24 Defendants.)
25 _____)

MEMORANDUM IN SUPPORT OF
NUGGET CONSTRUCTION,
INC.'S AND UNITED STATES
FIDELITY & GUARANTY
CO., INC.'S MOTION FOR
SUMMARY JUDGMENT AGAINST
NORTH STAR TERMINAL &
STEVEDORE CO.

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1 Pursuant to Federal Rule of Civil Procedure 56, Defendant Nugget
2 Construction, Inc. ("Nugget") respectfully moves for summary judgment
3 on all state law claims and causes of action alleged by Intervening
4 Plaintiff/Use-Plaintiff North Star Terminal & Stevedore Co. ("North
5 Star") in its Amended Complaint filed August 31, 2005.¹ As Nugget
6 demonstrates herein, there is no genuine issue as to any material fact
7 and Nugget is entitled to summary judgment as a matter of law.

8 Introduction

9 Following the Ninth Circuit's March 3, 2005 decision in the
10 above-captioned matter denying summary judgment to all parties and
11 remanding the matter for further proceedings, North Star amended its
12 complaint to include not only its several allegations based on a
13 "telescoping" of the relationship between North Star and Nugget under
14 the Miller Act,² but also to include an exhausting number of claims
15 under Alaska state law. North Star was subsequently afforded
16 considerable latitude to conduct additional discovery for the purpose
17 of substantiating these allegations and developing its claims.

18 ¹ To the extent that North Star asserts state law claims against Nugget's
19 surety, United States Fidelity & Guaranty Company ("USF&G"), USF&G also moves
20 for summary judgment on all grounds raised by Nugget herein.

21 ² In its amended complaint, North Star alleges that Nugget orchestrated a
22 remarkable conspiracy involving Nugget, USF&G, Spencer Rock Products, Inc.
23 ("Spencer Rock"), and Spencer Rock's bank for the express purpose of avoiding
24 payments to Spencer Rock's vendors. What makes this allegation even more
25 remarkable is that North Star disregards the significant and established fact
that, although Spencer Rock's material suppliers may have lost tens of
thousands of dollars as a result of Spencer Rock's financial downfall, Nugget
sustained losses in excess of \$1.5 million as a result of its dealings with
Spencer Rock. Although not the subject of the instant motion, Nugget will
show that North Star's allegations under the federal Miller Act are as
baseless as its state law claims addressed herein.

1 One need not reflect too long upon North Star's amended complaint
2 to conclude that North Star's separate but largely overlapping state
3 law claims were plead so that it could inflate its potential recovery
4 from Nugget with a grossly disproportionate \$1,000,000 punitive
5 damages claim.³ North Star is certainly well aware that its punitive
6 damages claim would not be permissible if North Star were proceeding
7 under the federal Miller Act alone. Thus, to say that North Star's
8 state law claims are untimely raised is a considerable understatement,
9 as there is absolutely no reason why North Star could not have
10 included these claims in its original complaint filed approximately
11 eight years ago.

12 Why then were these claims not included as part of North Star's
13 original complaint? The plain answer is that, at the time North Star
14 filed its original complaint, North Star believed that there were no
15 facts to substantiate such claims. North Star's inclusion of these
16 state law claims can thus reflect only an opportunistic and last-ditch
17 effort to have yet another (and much bigger) bite at the apple by
18 continuing to reinvent its theory of recovery in the wake of adverse
19 decisions from the Ninth Circuit.

20 Here, the record is devoid of any factual bases to support North
21 Star's demand upon Nugget. North Star entered into a contract with
22 Spencer Rock and rendered services under that contract, for which

23 ³ Given this Court's prior ruling that no fees are available under the Miller
24 Act claims, North Star's demand for punitive damages is nothing more than a
25 thinly veiled attempt to recover the large fees it has undoubtedly incurred
hoping to find Nugget responsible for its claims.

1 North Star invoiced Spencer Rock. North Star extended credit to
2 Spencer Rock per a written credit agreement with Spencer Rock, which
3 was supported by a personal guarantee signed and executed by Spencer
4 Rock's President, Robert A. LaPore. When Mr. LaPore indicated that he
5 was unable to pay North Star for its services, North Star credited
6 Spencer Rock's account \$7,500 in consideration for a "skip bucket"
7 owned by Spencer Rock and used by North Star during its performance.
8 Jeffrey Bentz, North Star's corporate designee, expressly admitted
9 that North Star commenced performance per a contract with Spencer Rock
10 and North Star's contemporaneous correspondence confirms that North
11 Star's services were rendered per a contract with Spencer Rock. The
12 record is also clear that Mr. LaPore acknowledged his and Spencer
13 Rock's responsibility to pay North Star for his arrearages, and that
14 North Star continues to pursue Mr. LaPore and Spencer Rock for
15 payment.

16 North Star makes much of the fact that L.D. "Randy" Randolph,
17 Nugget's project manager, whose duties included overseeing the loading
18 of rock on to Nugget's barges, provided direction and instruction to
19 North Star employees. It is a strange claim indeed to think that Mr.
20 Randolph, tasked with such responsibility, would not want to
21 communicate clearly and directly to the parties physically handling
22 and loading the rock onto barges for which he was responsible. Jack
23 Goodwill, North Star's primary point of contact with Mr. Randolph
24 during performance, confirmed that Mr. Randolph's instruction and
25

1 direction constituted nothing out of the ordinary and that, in fact,
2 Mr. Randolph did a good job overseeing barge loading and scheduling.

3 Although there may be subtle differences among their particular
4 circumstances, North Star's story is essentially the same as its
5 companion plaintiffs, Metco and Shoreside. North Star entered into a
6 contract with Spencer Rock, extended significant amounts of credit to
7 Spencer Rock, and continued performance with only the promise of
8 payment from Mr. LaPore, upon the belief that North Star was protected
9 by Nugget's bond. North Star's belief was founded upon the express
10 advice of its legal counsel and, as will be discussed herein, when
11 North Star was confronted with the possibility that the bond's
12 coverage did not extend as far as North Star had anticipated, North
13 Star began a process of historical revisionism, first and foremost by
14 attempting to create a record after-the-fact that would show it was
15 "protected contractually" with Nugget. North Star's historical
16 revisionism has since continued, evidenced by its patently
17 manufactured and baseless charges of conspiracy, as well as and its
18 insistence, beyond the bounds of logic and common sense, and in
19 contravention of the established law of the case, that it is entitled
20 to recovery from Nugget for amounts that Spencer Rock failed to pay to
21 North Star under a contract between North Star and Spencer Rock, based
22 on theories of breach of contract, promissory estoppel, quasi-
23 contract, agency, detrimental reliance, quantum meruit,

24 ///

25 ///

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1 misrepresentation and nondisclosure, negligence, equitable
2 subordination, and constructive trust.⁴

3 North Star's conduct begs the following questions: How can
4 Nugget be in breach of contract when North Star acknowledges that
5 there was no express contract between Nugget and North Star? How can
6 Nugget be held to an implied-in-fact contract in the absence of any
7 evidence on the part of North Star or Nugget to be bound to one
8 another, and upon a record that unequivocally establishes a
9 contractual agreement between North Star and Spencer Rock? How can
10 North Star honestly argue that it relied on Nugget's actions to its
11 detriment, when North Star's senior employee overseeing North Star's
12 work indicated that Nugget's conduct during barge loading was nothing
13 out of the ordinary? How can North Star allege that Nugget's
14 backcharging of Spencer Rock was illicit or improper, or that it was
15 detrimentally affected by the non-disclosure of the Support Agreement,
16 when North Star has been party to such agreements? Finally, how could
17 Nugget have been unjustly enriched in view of the undisputed fact that
18 Nugget sustained losses in excess of \$1.5 million resulting from
19 Nugget's contract with Spencer Rock?

20 ⁴ North Star's Amended Complaint also includes a bad faith claim that appears
21 to be directed solely at USF&G. North Star's Amended Complaint, ¶ 38. To
22 the extent that North Star's bad faith claim is directed at Nugget, such
23 claim is completely without merit. Nugget has every right to legally defend
24 itself against claims that are baseless and allegations that are unfounded in
25 the manner Nugget so chooses. To date, the Ninth Circuit has confirmed the
propriety of Nugget's position in this matter, when it found Spencer to be a
supplier, a fact that North Star conveniently ignores. Nugget's
unwillingness to subject itself to further burden and expense under such
circumstances is unequivocally within its legal right, and is not an act of
bad faith.

1 Even a cursory review of North Star's state law claims in full
2 view of the undisputed facts establishes that these claims are both
3 factually and legally baseless. To be sure, North Star's laundry list
4 of state law claims reflects its mulish insistence that Nugget should
5 pay North Star the money that Spencer Rock did not for North Star's
6 work for Spencer Rock (as well as over eight times that amount in
7 punitive damages) because the Homer Spit Project was a federally-
8 bonded project. North Star remains unwilling to accept the Ninth
9 Circuit's September 21, 2001 decision that firmly established that
10 North Star's position was flatly wrong. North Star also remains
11 equally oblivious to the notion that its insistence in this regard
12 does not render its position any more credible, or any less erroneous,
13 over time. The alleged factual and legal substance behind North
14 Star's state law claims are belied by their conspicuous absence at the
15 outset of this litigation, as well as the undisputed facts to the
16 contrary that are discussed herein. Accordingly, in the absence of
17 any genuine issue of material fact, Nugget is entitled to summary
18 judgment as a matter of law.

19 I. STATEMENT OF FACTS⁵

20 A. THE CONTRACT BETWEEN NUGGET AND SPENCER ROCK

21 1. On or about September 28, 1996, the U.S. Corps of Engineers
22 ("USCOE") awarded Nugget Contract DACW85-96-C-0020 to repair and
23 extend the Homer Spit in Seward, Alaska (the "Project"). See Contract

24 ⁵ The facts set forth herein are supported by the accompanying Affidavits of
25 Lynn D. "Randy" Randolph, Nugget's Project Manager for this contract, and
Thomas P. Krider.

1 No. DACW85-96-C-0020, attached as Ex. 1 to Affidavit of Lynn D.

2 "Randy" Randolph, April 28, 2006, ("Randolph Aff."), Ex. 1, ¶ 2.

3 USF&G provided a payment bond on the Project. See Payment Bond 99-
4 0120-50298-96-5, attached as Ex. 2 to Randolph Aff., ¶ 2.

5 2. On January 15, 1997, Nugget entered into a Material
6 Contract with Spencer Rock for the supply and transport of armor, toe
7 and filter stone rock from the Spencer Quarry, located in Seward,
8 Alaska, to a barge docked in Seward. See Material Contract, December
9 18, 1996, attached as Ex. 3 to Randolph Aff., ¶ 3.

10 3. Between the Spencer Quarry and the Seward dock, the rock
11 traveled in four distinct segments. First, after blasting, rocks were
12 gathered and loaded into trucks at the Spencer Quarry. These trucks
13 transported the rock from the Spencer Quarry to the Alaska Railroad
14 Corporation ("ARRC") station, where the rock was loaded into ARRC rail
15 cars. This work was performed by Spencer Rock (which was later
16 assisted by Nugget). Second, the rock traveled by ARRC rail car to
17 Seward, where it was unloaded from the rail cars onto a "siding" at
18 the ARRC rail yard in Seward. Third, the rock was transported by
19 truck from the siding at the ARRC rail yard in Seward to the Seward
20 dock. Fourth, and finally, the rock was loaded by North Star into
21 "skip boxes" and from the boxes at the Seward dock onto barges, which
22 carried the rock to the Homer Spit; North Star's involvement in the
23 Project was limited to this fourth and final segment. See Randolph
24 Aff., ¶ 3.

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1 B. THE SUPPORT AGREEMENT BETWEEN NUGGET AND SPENCER ROCK

2 4. Spencer Rock commenced performance on or about January 15,
3 1997. In April 1997, Nugget became concerned that Spencer Rock was
4 not producing enough quantities of conforming rock for the Project.
5 First, Nugget visited the Spencer Quarry and found large stockpiles of
6 nonconforming rock. Second, Spencer Rock's major pieces of equipment
7 for operating the Spencer Quarry had been repossessed by Spencer
8 Rock's bank. In light of these developments, in early April 1997,
9 Spencer Rock approached Nugget for assistance in carrying out Spencer
10 Rock's duties under the Material Contract. Spencer Rock and Nugget
11 subsequently executed a Support Agreement on April 23, 1997. See
12 Support Agreement, April 23, 1997, attached as Ex. 4 to Randolph Aff.,
13 ¶ 4. Per this agreement, the parties agreed that, in exchange for
14 Nugget's support of Spencer Rock's work under the Material Supply
15 Contract ("Material Contract"), Nugget would recover from Spencer
16 Rock, or "backcharge," the amounts owed to Nugget by Spencer Rock per
17 the Material Contract; it thus memorialized an arrangement between
18 Nugget and Spencer Rock in which the parties in effect agreed to
19 modify the Material Contract such that Nugget would be fairly
20 compensated for its assistance to Spencer Rock, nothing more. *Id.*

21 5. Nugget's support efforts to Spencer Rock were provided
22 exclusively to Spencer Rock. Nugget never offered or provided its
23 support services to North Star, Shoreside or Metco. See Randolph
24 Aff., ¶ 5.

1 6. The total amount of rock that Spencer Rock was
2 contractually obligated to transport, and that was in fact transported
3 with Nugget's assistance, from the Spencer Quarry to the Nugget barges
4 in Seward was equal to ten barge loads. See *id.*, ¶ 6.

5 7. Between May 8 through August 8, 1997, Nugget paid Spencer
6 Rock \$197,184.66 for work performed under the Material Contract. See
7 *id.*, ¶ 7.

8 8. Based on the total quantity of rock delivered for the
9 project at the rates and terms set forth in the Material Contract, the
10 total value of rock produced by Spencer Rock was \$1,623,892.50.
11 Nugget's costs associated with rendering assistance to Spencer Rock
12 pursuant to the Support Agreement were \$1,878,138. In addition, as a
13 direct result of Spencer Rock's failure to provide rock that conformed
14 to the Material Contract, Nugget incurred additional expenses in
15 excess of \$1,213,380. Thus, the total amount of costs and expenses
16 that Nugget incurred resulting from its dealings with Spencer Rock
17 exceeded the amount that Nugget agreed to pay Spencer Rock under the
18 Material Contract by \$1,664,811. See *id.*, ¶ 8.

19 C. THE CONTRACT BETWEEN SPENCER ROCK AND NORTH STAR

20 9. In mid-August 1996, Robert A. LaPore, then President of
21 Spencer Rock, approached Jack Goodwill, then Vice President for
22 Northern Stevedore and Handling Corp., regarding North Star's
23 potential involvement in the Homer Spit Project. See Krider Aff., Ex.
24 1, Deposition of Jack Goodwill, March 16, 2006 ("Goodwill Dep."), p.
25 14, lines 22-25, p. 15, lines 1-4, Ex. 3; Affidavit of Jack Goodwill,

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1 Dec. 7, 1998, ("1998 Goodwill Aff.") ¶ 3, attached as Ex. 5 to
2 Goodwill Dep. Afterward, Mr. LaPore had a conversation with Mr.
3 Goodwill in which Mr. LaPore requested that North Star load rock on to
4 Nugget's barges that would be transporting rock to the Homer Spit.
5 See *id.*, 1998 Goodwill Aff., ¶ 4, attached as Ex. 5 to Goodwill Dep.;
6 Krider Aff., Ex. 2, Deposition of Jeffrey Bentz, November 21, 2005,
7 ("2005 Bentz Dep."), p. 136, lines 3-19, p. 137, lines 6-16. "It was
8 orally agreed that [North Star] was to bill Spencer Rock for the
9 loading based on the labor and equipment used, on a time and material
10 basis, according to [North Star]'s standard rates for labor and
11 equipment usages in 1997." *Id.*, 1998 Goodwill Aff., ¶ 3, attached as
12 Ex. 5 to Goodwill Dep.

13 10. As a consequence of these discussions, "on January 28,
14 1997, Spencer Rock agreed to credit terms with [North Star]." Krider
15 Aff., Ex. 1, 1998 Goodwill Aff., ¶ 4, attached as Ex. 5 to Goodwill
16 Dep. By the terms of the credit agreement, Spencer Rock agreed to
17 "pay the full amount of the invoice(s) when due, which is defined to
18 be thirty (30) days from the invoice date unless otherwise specified
19 on the invoice." *Id.*, North Star Terminal & Stevedore Co. Commercial
20 Credit Application, attached as Ex. 2 to Goodwill Dep. The agreement
21 also specified that: "[Spencer Rock] agrees to notify [North Star]
22 promptly of any changes in ownership of the business conducted under
23 the account name, and agrees to liability for all charges to the
24 business conducted under the account name unless and until [North
25

1 Star] receives written notice of a change in ownership of that
2 business." *Id.*

3 11. In connection with the agreement, Mr. LaPore also executed
4 an "Individual Personal Guarantee" to North Star dated January 28,
5 1997, in which Mr. LaPore agreed that: "In consideration of extension
6 of credit to applicant and/or forbearance from immediate collection of
7 any existing indebtedness to you, I/we hereby unconditionally
8 guarantee, jointly and severally, punctual payment and performance of
9 all applicant's obligations, present and future, to North Star." *Id.*

10 D. CIRCUMSTANCES SURROUNDING SPENCER ROCK'S FAILURE TO PAY NORTH
11 STAR

12 12. North Star provided barge loading services to Spencer Rock
13 between May 1, 1997 and June 26, 1997, and billed Spencer Rock a total
14 amount of \$124,724.98 for services rendered. See Krider Aff., Ex. 1,
15 1998 Goodwill Aff., ¶ 8, attached as Ex. 5 to Goodwill Dep. Mr.
16 Goodwill was North Star's senior employee, and most directly involved
17 in day-to-day operations for North Star's work, on the Homer Spit
18 project. See Krider Aff., Ex. 2, 2005 Bentz Dep., p. 124, lines 1-6.

19 13. The end of North Star's involvement in the Homer Spit
20 project coincident with Nugget's decision to relocate barge loading
21 operations to the "City Dock." 1998 Goodwill Aff., ¶ 10, attached as
22 Ex. 5 to Goodwill Dep., Ex. 3.

23 14. By letter dated August 4, 1997 addressed to Mr. Dave Scott
24 and Mr. Doug Wood, Army Corps of Engineers, Mr. Goodwill asked the
25 Army Corps of Engineers to assist North Star's recovery of \$124,724.98
for services rendered to Spencer Rock on the Homer Spit project. In

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1 this letter, Mr. Goodwill specifically and expressly indicates that:
2 (i) North Star negotiated a contract for services exclusively with
3 Spencer Rock in August 1996; (ii) under said contract, "[North Star]
4 was to bill Spencer for the loading based on labor and equipment
5 used;" (iii) North Star loaded five barges for the Homer Spit under
6 said contract; (iv) North Star timely invoiced Spencer Rock for
7 services rendered; (v) no payment has been received from Spencer Rock
8 for services rendered, and; (vi) Mr. LaPore had stated North Star
9 would be paid when Spencer Rock received payment from Nugget. Mr.
10 Goodwill also expressed his understanding that Mr. Randolph worked for
11 Nugget, and that Mr. Randolph had contacted North Star in late April
12 1997, prior to North Star's commencement of work, regarding the
13 arrival dates for the first barge and the need for the barge to fitted
14 with wear deck. Mr. Goodwill also stated that Mr. Randolph was
15 responsible for "all the decisions on the loading of the barges; what
16 type of rock to load, the quantity to load, arrival and departure of
17 the barges." Krider Aff., Ex. 2, Letter from Jack Goodwill to Dave
18 Scott and Doug Wood, August 4, 1997, attached as Ex. 14 to 2005 Bentz
19 Dep.

20 15. On September 3, 1997, John Armstrong of North Star
21 indicated in an email to Mr. Goodwill, Mr. Brazier and Scott Francis,
22 North Star, that: "I received a call from Bob at Spencer Rock
23 yesterday regarding the money that was owed us from the Nugget
24 Construction Rock Job in Seward. Bob is suggesting that he give us
25 the skip bucket that he built for this job, in exchange for \$7,400

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1 credit on his account with us." The following day, Mr. Goodwill
2 responded: "Sounds like a good idea, but is the bucket paid for? Who
3 really owns the bucket? I would wait until we are paid in full, then
4 approach Spencer on giving us the bucket in lieu of passing on our
5 lawyers fees to Spencer." Mr. Francis also responded, directing Mr.
6 Francis and Mr. Goodwill to "tell Spencer that we will purchase the
7 bucket subject to inspection and a clear 'Bill of Sale.' However we
8 will not transfer funds or issue a credit until the current
9 outstanding account is brought back to good standing." Krider Aff.,
10 Ex. 3, Email from Scott Francis, Sept. 4, 1997, attached as Ex. 4 to
11 March 28, 2006 Deposition of Jeffrey Bentz ("2006 Bentz Dep.").

12 16. On September 30, 1997, North Star and Spencer Rock executed
13 a bill of sale in which North Star agreed to purchase from Spencer
14 Rock the "bulk product handling skip bucket and all attachments
15 necessary (FOB Seward Alaska)" in consideration for \$7,500 "to be
16 applied to moneys owed [North Star]." Krider Aff., Ex. 2, Bill of
17 Sale, attached as Ex. 13 to 2005 Bentz Dep.

18 17. Despite its insistence that Nugget is responsible for
19 Spencer Rock's arrearages to North Star in connection with the
20 Project, North Star has continued to pursue both Spencer Rock and Mr.
21 LaPore "to get paid what's due [North Star] on the job." Krider Aff.,
22 Ex. 2, 2005 Bentz Dep., p. 88, lines 5-11. This is consistent with
23 Mr. LaPore's express acknowledgement to North Star that both he and
24 Spencer Rock are responsible for these arrearages. See Krider Aff.,
25 Ex. 1, 1998 Goodwill Aff., ¶ 10, attached as Ex. 5 to Goodwill Dep.

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1 E. INTERACTION BETWEEN NUGGET AND NORTH STAR

2 18. In April 1997, prior to the commencement of North Star's
3 loading of rock, Mr. Randolph contacted North Star regarding
4 scheduling for the barge loading, as well as the need for a
5 certificate of insurance from North Star, in the event that a barge
6 was damaged during the loading. See Randolph Aff., ¶ 8; Krider Aff.,
7 Ex. 1, Transmittal from Jack Goodwill to George Palmer, April 30,
8 1997, attached as Ex. 4 to Goodwill Dep.

9 19. The barges used to transport the rock to the Homer Spit
10 were under Nugget's responsibility and control. Consequently, Mr.
11 Randolph was tasked with the responsibility to coordinate scheduling
12 and loading of the barges, including the type and quantity of rock
13 loaded and the arrival and departure of the barges; this required
14 direct communication between Mr. Randolph and Mr. Goodwill to ensure
15 that loading proceeded smoothly. Mr. Randolph's direction to North
16 Star regarding the loading and scheduling of the barges was expressly
17 authorized by Mr. LaPore and Spencer Rock, per the Support Agreement.
18 See Randolph Aff., ¶ 9. Based on his experience, Mr. Goodwill did not
19 believe Mr. Randolph's actions in this regard unusual for an
20 individual responsible for a vessel; in fact, Mr. Goodwill believed
21 that Mr. Randolph "did a very good job" and "stayed right on top of
22 it." Krider Aff., Ex. 1, Goodwill Dep., p. 80, lines 23-25; p. 81,
23 lines 1-2. Further, Mr. Randolph's involvement or direction did not
24 affect how North Star performed its work. See *id.* at 84, lines 7-9.

1 ("Q. So Mr. Randolph's involvement didn't cause you to change how you
2 were performing your work, did it? A. No.").

3 20. Mr. Goodwill was aware that the skip bucket that North Star
4 used to load the rock onto the barges was owned by Spencer Rock, not
5 Nugget. See *id.*, p. 81, lines 9-11.

6 21. On August 7, 1997, Mr. Brazier had a conversation with Mr.
7 Randolph during which Mr. Randolph explained the basis for Nugget's
8 decision to load the barges from the City Dock, and also explained
9 that that Spencer Rock is not a subcontractor to Nugget and,
10 therefore, North Star was not covered by Nugget's bond. In reference
11 to this conversation, Mr. Francis subsequently stated that, "we can
12 still do business with [Mr. Randolph] on a cash basis. However, we
13 have to make sure we are protected contractually with this character.
14 Also, we have to be careful that we don't just black list someone."
15 Krider Aff., Ex. 3, Email from Scott Francis, August 7, 1997, attached
16 as Ex. 6 to 2006 Bentz Dep.

17 22. No Nugget representative was present during, or otherwise
18 involved in, the negotiations between Mr. LaPore and Mr. Goodwill that
19 led to the contract under which North Star agreed to provide services
20 to Spencer Rock on the Homer Spit project. See Randolph Aff., ¶ 10.
21 This is consistent with North Star's understanding that it entered
22 into a contract with Spencer Rock, not Nugget. See Krider Aff., Ex.
23 2, 2005 Bentz Dep., p. 150, lines 10-22, Ex. 4.

1 23. Nugget never entered into a written or oral contract,
2 express or implied, with North Star to provide services in connection
3 with the Homer Spit project. See Randolph Aff., ¶ 11.

4 24. Nugget never received invoices from North Star during the
5 course of North Star's performance and Nugget never agreed to pay
6 North Star for any services that it provided to Spencer Rock in
7 connection with the Homer Spit project. See Randolph Aff., ¶ 12;
8 Goodwill Dep., p. 49, lines 3-5; p. 57, lines 17-19.

9 25. Nugget's payments to Spencer Rock for its work under the
10 Material Contract were made exclusively to Spencer Rock and never to
11 North Star. See Randolph Aff., ¶ 13.

12 26. Nugget never manifested any intention, directly or
13 indirectly, by word or conduct, that Spencer Rock was an agent of
14 Nugget, or otherwise authorized Spencer Rock or Mr. LaPore to speak on
15 behalf of Nugget. Further, Mr. Randolph never indicated to anyone by
16 word or conduct that he worked for Spencer Rock, in any capacity,
17 while he was employed by Nugget during the Homer Spit project. See
18 Randolph Aff., ¶ 15; Krider Aff., Ex. 1, Goodwill Dep., p. 34, lines
19 18-22.

20 27. The only specific evidence that North Star has identified
21 to support an oral contract between North Star and Spencer Rock is
22 "Mr. Randolph's instruction on where to send [North Star's] bill."
23 Krider Aff., Ex. 1, Goodwill Dep., p. 83, lines 1-5, Ex. 3; see also
24 *id.*, p. 82, lines 12-25.

1 28. Mr. Goodwill is familiar with the concept of backcharging,
2 because, among other reasons, North Star has been involved in
3 backcharging arrangements prior to its work on the Homer Spit project.
4 See *id.*, Goodwill Dep., p. 84, lines 10-25; p. 85 lines 1-11.

5 29. The foundation of North Star's belief that it is entitled
6 to recovery from Nugget has always been based on its misunderstanding
7 that Spencer Rock was a subcontractor to Nugget and not a material
8 supplier and further, that, because the Homer Spit project was a
9 bonded project, North Star could proceed directly against Nugget under
10 its bond. See Krider Aff., Ex. 1, 1998 Goodwill Aff., ¶ 9, attached
11 as Ex. 5 to Goodwill Dep.; Krider Aff., Ex. 2, 2005 Bentz Dep., p.
12 151, lines 23-25; p. 152, line 1.

13 II. LEGAL ARGUMENT

14 A. SUMMARY JUDGMENT STANDARD OF REVIEW

15 Rule 56(c) of the Federal Rules of Civil Procedure instructs that
16 a motion for summary judgment shall be "rendered forthwith if the
17 pleadings, depositions, answers to interrogatories, and admissions on
18 file, together with the affidavits, if any, show that there are no
19 genuine issue as to any material fact and that the moving party is
20 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
21 Federal summary judgment procedure requires the piercing through the
22 pleadings and their adroit craftsmanship to reach the substance of the
23 claim. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
24 475 U.S. 574, 587 (1986).

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1 Where the record taken as a whole could not lead a rational trier
2 of fact to find for the non-moving party, then there is no genuine
3 issue for trial. See *id.* Accordingly, "an adverse party may not rest
4 upon the mere allegations or denials of his pleading, but his
5 response, by affidavits or as otherwise provided in this rule, must
6 set forth specific facts showing that there is a genuine issue for
7 trial." Fed. R. Civ. P. 56(e).

8 B. BECAUSE THERE WAS NO CONTRACT BETWEEN NUGGET AND NORTH STAR,
9 EXPRESS OR IMPLIED-IN-FACT, NORTH STAR'S BREACH OF CONTRACT CLAIM
10 MUST FAIL

11 At the heart of North Star's implied in fact contract claim is
12 the allegation that that North Star worked directly for Nugget and,
13 specifically, that the direct communications between Mr. Goodwill and
14 Mr. Randolph during the loading of the barges created an implied-in-
15 fact contractual relationship. As Nugget will show herein, Mr.
16 Randolph's direct dealings with Mr. Goodwill, as is true of all of Mr.
17 Randolph's dealings with North Star, does not evidence a meeting of
18 the minds between Nugget and North Star. Indeed, the undisputed
19 evidence shows that Mr. Randolph acted as would any prudent person
20 responsible for the safe, smooth and efficient loading of rock onto a
21 barge, by communicating directly with the individuals who were charged
22 with physically loading that rock. These communications do not
23 evidence the intent necessary to establish the existence of an
24 implied-in-fact contract.

25 It is established law of the case that North Star "never entered
into express contracts with Nugget." *North Star Terminal & Stevedore*

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1 *Co. ex rel. v. Nugget Construction Inc., et al. v. North Star*
2 *Petroleum Inc. ex rel; North Star, Inc.*, Slip Op. No. 02-35887 at 4
3 (9th Cir., March 3, 2005). Thus, in the absence of an express
4 contract, such contract must be implied-in-fact if Nugget is to be
5 held in breach.

6 Under Alaska law,⁶ an implied-in-fact contract requires all of
7 the elements of an express contract and, significantly, an intent to
8 be bound. See *Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130,
9 1140 (Alaska 1996). An implied-in-fact contract "arises where the
10 court finds from the surrounding facts and circumstances that the
11 parties intended to make a contract but failed to articulate their
12 promises and the court merely implies what it feels the parties
13 intended." *Id.* at 1140. "[I]mplied-in-fact contracts are closely
14 related to express contracts" whereby "each requires the parties to
15 form an intent to enter into a contract." *Id.* at 1142; see also
16 *Altman v. Alaska Truss & Mfg.*, 677 P.2d 1215, 1226 (Alaska 1983) ("an
17 implied-in-fact contract only exists where there is mutual assent
18 between the parties").

19 The material and undisputed facts establish that North Star
20 entered into and performed under a contract with Spencer Rock, and
21 only Spencer Rock, and that there was never any claim of a contractual

22 ⁶ It bears noting that the legal elements necessary to establish the existence
23 of a contract implied-in-fact under Alaska state law are distinct from the
24 elements necessary to establish federal Miller Act liability under a
25 "strawman" theory; significantly, even if North Star could substantiate its
 Miller Act claims, which it cannot, this fact alone would not indicate the
 existence of an implied-in-fact contract under Alaska law between Nugget and
 North Star without additional evidence of a meeting of the minds.

1 relationship between North Star and Nugget until North Star realized
2 that Spencer Rock and Mr. LaPore did not intend to pay North Star for
3 its services. North Star's penchant for historical revisionism could
4 not be more evident: After realizing that Nugget's bond would not
5 protect North Star from Spencer Rock's nonpayment, North Star's Scott
6 Francis advised that: "We can still do business with Mr. Randolph on
7 a cash basis. However, [w]e have to make sure we are protected
8 contractually with this character." Krider Aff., Ex. 3, Email from
9 Scott Francis, August 7, 1997, attached as Ex. 6 to 2006 Bentz Dep.
10 North Star's insistence on being "contractual protected" in its
11 further dealings with Nugget, utterly belie its revisionist assertion
12 that it had a contractual relationship with Nugget from the outset of
13 its work for Spencer Rock.

14 North Star's affinity for shrouding fact with fiction is equaled
15 only by the disturbing ease with which it can assert positions
16 entirely inconsistent with one another. North Star's claim of a
17 contract with Nugget and demand for payment thereunder does not stop
18 North Star from also arguing that: "North Star had valid agreements
19 with Spencer and LaPore to provide services, labor and equipment in
20 connection with the Homer Project under set terms, prices and
21 conditions." North Star's Amended Complaint, ¶ 35. It is difficult
22 to understand how claims against Nugget based upon implied-in-fact
23 contract can co-exist in such proximity with an assertion that renders
24 such claims both factually and legally impossible.

1 Notwithstanding these observations that cast serious doubt upon
2 North Star's credibility, the undisputed facts establish independently
3 that there was never a meeting of the minds between North Star and
4 Nugget sufficient to impose an implied-in-fact contract. North Star's
5 contract for work was negotiated between Mr. Goodwill and Mr. LaPore
6 and involved no one from Nugget. North Star and Spencer Rock
7 thereafter entered into a credit agreement that was supported by a
8 personal guarantee by Mr. LaPore, which did not involve Nugget in any
9 capacity. North Star invoiced Spencer Rock, not Nugget, during North
10 Star's period of performance. North Star was fully aware that the
11 skip box into which it was loading rock was owned by Spencer Rock and
12 not Nugget. After Mr. LaPore and Spencer Rock failed to pay North
13 Star, it was Spencer Rock's account, not a Nugget account, that was
14 credited for the sale of the skip box; further, North Star has
15 continued to pursue Spencer Rock and LaPore for payment from the date
16 of nonpayment to the present, which is consistent with North Star's
17 understanding at the time that "it ha[d] been working for Spencer Rock
18 Products from May 1, to June 26, 1997," as well as its current claim
19 that "North Star had valid agreements with Spencer and LaPore to
20 provide services, labor and equipment in connection with the Homer
21 Project under set terms, prices and conditions." Krider Aff., Ex. 1,
22 Letter from Jack Goodwill to Dave Scott and Doug Wood, Aug. 4, 1997,
23 attached as Ex. 14 to 2005 Bentz Dep.; *Id.*, North Star's Amended
24 Complaint, attached as Ex. 5 to 2005 Bentz Dep. Moreover, the
25 foregoing undisputed facts are entirely consistent with Mr. LaPore's

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1 express admission of liability to North Star for his breach of
2 contract, the truth of which is untainted by Mr. LaPore's patently
3 false assertion that Spencer Rock was never paid by Nugget, which in
4 turn, affected Spencer Rock's ability to pay North Star. See Krider
5 Aff., Ex. 1, 1998 Goodwill Aff., ¶ 10, attached as Ex. 5 to Goodwill
6 Dep.

7 North Star's insistence that Mr. Randolph's direction to Mr.
8 Goodwill was sufficient to create an implied-in-fact contract is
9 nothing more than a red herring, designed to draw the Court's
10 attention from the complete absence of evidence suggesting that North
11 Star believed it had a contract with Nugget - at least until North
12 Star determined, ultimately following the Ninth Court's earlier
13 decision in this matter, that North Star was not protected by Nugget's
14 bond. It was a Nugget barge onto which rock was being loaded;
15 therefore, it was a Nugget representative, Mr. Randolph, who naturally
16 provided direction regarding barge scheduling and loading. For the
17 same reason, it can only be regarded as a prudent decision on Mr.
18 Randolph's part to ensure that the barge deck would not be damaged by
19 the loading operations by requesting a certificate of insurance from
20 the company physically responsible for dropping the rock onto the
21 barge deck. As Mr. Goodwill indicated, Mr. Randolph's directions and
22 conduct in this regard were nothing out of the ordinary.

23 The undisputed facts show that, Nugget's interaction with North
24 Star was the natural and ordinary consequence of the type of work
25 performed by North Star, and necessary to ensure smooth, efficient and

1 safe progress. Nugget never expressed an intent to be bound to North
2 Star; similarly, North Star cannot point to any contemporaneous
3 evidence demonstrating that North Star believed its contract was with
4 Nugget and not Spencer Rock. Consequently, North Star's implied-in-
5 fact contract claim must fail.

6 C. Because North Star's performance was not influenced by Nugget,
7 and because Nugget was not required to disclose the Support
8 Agreement, North Star's promissory estoppel, detrimental reliance
9 and misrepresentation and nondisclosure claims must fail

10 Although identified as three separate causes of action, North
11 Star raises essentially the same allegations to support its promissory
12 estoppel, detrimental reliance, and misrepresentation and
13 nondisclosure claims. In support of its promissory estoppel claim,
14 North Star alleges that Nugget's words and conduct induced North Star
15 to provide services to the Homer Spit Project. See North Star's
16 Amended Complaint, ¶ 27. Similarly, in support of its detrimental
17 reliance claim, North Star asserts that the bond posted by Nugget and
18 USF&G was "an additional inducement for it to continue performing."
19 *Id.*, ¶ 30. Finally, North Star's detrimental reliance claim resembles
20 strongly its misrepresentation and nondisclosure claim: "By such
21 words, conduct and/or omissions, [Nugget] misled North Star, the
22 Federal Government and other companies similarly situated to North
23 Star, regarding the true relationships between Spencer and Nugget, the
24 security of the payment bond, and Nugget's dominance and control over
25 Spencer and LaPore and rechanneling payments to itself for its own
benefit." *Id.*, ¶ 33. The common thread running through each of these

1 causes of action is the assertion that North Star's performance was
2 induced upon reliance of some act or omission on the part of Nugget.

3 i. Nugget never made an actual promise or affirmative act

4 Under Alaska law, there are four requirements for a promissory
5 estoppel claim: "(1) the action induced amounts to a substantial
6 change of position; (2) it was either actually foreseen or reasonably
7 foreseeable by the promisor; (3) an actual promise was made and
8 itself induced the action or forbearance in reliance thereon; and (4)
9 enforcement is necessary in the interest of justice." *Reeves v.*
10 *Alyeska Pipeline Serv. Co.*, 926 P.2d 1130, 1142 (Alaska 1996).
11 Significantly, Alaska courts have long held that promissory estoppel
12 requires that "an actual promise was made." *Brady v. State*, 965 P.2d
13 1, 10 (Alaska 1998).

14 Similarly, detrimental reliance can only occur, legally speaking,
15 when the party seeking to invoke the doctrine of equitable estoppel
16 has relied reasonably on the representation of the adverse party. See
17 *State Dept. of Revenue v. Northern TV, Inc.*, 670 P.2d 367, 370 (Alaska
18 1983). A party claiming equitable estoppel must prove four elements:
19 "(1) assertion of a position by conduct or word; (2) reasonable
20 reliance thereon; (3) resulting prejudice; and (4) the estoppel will
21 be enforced only to the extent that justice so requires." *Ogar v.*
22 *City of Haines*, 51 P.3d 333, 335 (Alaska 2002).

23 North Star's promissory estoppel and detrimental reliance claims
24 suffer from numerous and considerable shortcomings; most significant,
25 Nugget never made an "actual promise" to North Star, much less an

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1 actual promise that "itself induced the action or forbearance in
2 reliance thereon" on the part of North Star. *Reeves*, 56 P.3d at 670;
3 *see Brady*, 965 P.2d at 10. Neither Mr. Randolph nor anyone from
4 Nugget promised anything to North Star; moreover, North Star was never
5 induced to perform or render services by any act of Nugget; indeed,
6 Mr. Goodwill expressly confirmed that Mr. Randolph's involvement in
7 the Homer Spit Project - including Mr. Randolph's confirmation that
8 North Star's invoices should be sent to Spencer Rock - did not change
9 how North Star performed its work. See *Krider Aff.*, Ex. 1, Goodwill
10 Dep., p. 84, lines, 7-9. Because Mr. Randolph was not present at
11 contract negotiations between Mr. Goodwill and Mr. LaPore, and because
12 Mr. Randolph's directions and instructions to Mr. Goodwill and others
13 at North Star did not affect the way in which North Star conducted
14 itself during performance, there could not have been an actual promise
15 that induced any action or forbearance in connection with either: (i)
16 North Star's decision to enter into its agreement with Spencer Rock,
17 or (ii) North Star's continued performance under its contract with
18 Spencer Rock. For this reason alone, North Star's promissory estoppel
19 and detrimental reliance claims must fail.

20 ii. There is no duty to disclose the Support Agreement

21 In the absence of any affirmative act, the only conceivable fact
22 on which North Star could rely in support of its remaining

23 ///

24 ///

25 ///

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1 misrepresentation and nondisclosure claims⁷ is that it detrimentally
 2 relied upon, and was induced to act by, Nugget's nondisclosure of its
 3 Support Agreement with Spencer Rock. These remaining theories of
 4 recovery thus turn on one single and dispositive question of law: Was
 5 Nugget legally required to disclose its Support Agreement with Spencer
 6 Rock to North Star?

7 If the answer is yes, then there is a genuine issue of material
 8 fact regarding the nature of the relationship between Nugget and
 9 Spencer Rock and whether North Star would have relied upon the
 10 information in the Support Agreement in connection with the
 11 prosecution of its work under its contract with Spencer Rock. If the
 12 answer is no, then it does not matter whether North Star would have
 13 changed its position with the knowledge of information in the Support
 14 Agreement because North Star was not entitled to such information in
 15 the first instance.

16 ⁷ In addition to fraudulent and negligent misrepresentation, North Star also
 17 makes a claim for "innocent" misrepresentation. Innocent representation
 18 occurs when "one who, in a sale, rental or exchange transaction with another,
 19 makes a misrepresentation of a material fact for the purpose of inducing the
 20 other to act or to refrain from acting in reliance upon it, is subject to
 21 liability to the other for pecuniary loss caused to him by his justifiable
 22 reliance upon the misrepresentation, even though it is not made fraudulently
 23 or negligently." *Bevins v. Ballard*, 655 P.2d 757, 762 (Alaska 1982) (citing
 24 section 552C(1) of the Restatement (Second) of Torts (1977)). In addition to
 the reasons discussed herein why North Star's misrepresentation claim must
 fail, because there is no "sale rental or exchange transaction," North Star's
 innocent representation claim is inapposite. See also *Smith v. Tyonek*
Timber, Inc., 680 P.2d 1148, 1153-54 (Alaska 1984) (relying on *Moorman*
Manufacturing Co. v. National Tank Co., 435 N.E. 2d 443 (Ill. 1982), which
 held that a food processor could not recovery against a manufacturer of a
 defective grain storage tank for economic loss under the tort theories of
 strict liability, or negligence or innocent misrepresentation).

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1 Negligent misrepresentation arises when: (1) a party accused of
2 misrepresentation made a statement in the course of his business,
3 profession, or employment, or in any other transaction in which he has
4 pecuniary interest, (2) the representation supplied false information,
5 (3) there was justifiable reliance on the false information and (4)
6 the accused party failed to exercise reasonable care or competence in
7 obtaining or communicating information. See *Reeves v. Alyeska*
8 *Pipeline Serv. Co.*, 56 P.3d 660, 670-671 (Alaska 2002). Further,
9 "[n]ot every casual response, not every idle word, gives rise to a
10 cause of action," and, significantly, liability arises only where
11 there is a duty, if one speaks at all, to give correct information.
12 *Howarth v. Pfeifer*, 443 P.2d 39, 42 (Alaska 1968) (citing
13 *International Prods. Co. v. Erie R.R.*, 155 N.E. 662, 663, cert.
14 *denied*, 275 U.S. 527 (1927)).

15 Significantly, "[t]o prevail in an action for fraudulent or
16 negligent misrepresentation the plaintiff must prove the existence of
17 either an affirmative misrepresentation or an omission where there is
18 a duty to disclose." *Hagans, Brown & Gibbs v. First Nat. Bank of*
19 *Anchorage*, 810 P.2d 1015, 1019 (Alaska 1991). The duty to disclose
20 arises when facts are concealed or unlikely to be discovered because
21 of the special relationship between the parties, the course of their
22 dealings, or the nature of the fact itself. See *Matthews v. Kincaid*,
23 746 P.2d 470, 471-472 (Alaska 1987). Nondisclosure similarly requires
24 a failure to disclose information when there is an affirmative duty to
25 do so. *Turnbull v. LaRose*, 702 P.2d 1331, 1334 (Alaska 1985) (citing

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1 factors for disclosure of information for parties in a business
2 transaction as set forth in Restatement (Second) of Torts, § 551
3 (1977)).

4 As a threshold matter, North Star fails to acknowledge that the
5 Support Agreement is a legal and binding agreement between Nugget and
6 Spencer Rock. There is no rule or maxim, no statute or regulation, no
7 principle or guideline, under either Alaska state law or federal law,
8 that would preclude Spencer Rock from accepting Nugget's assistance in
9 completing Spencer Rock's work under its contract with Nugget and, in
10 full fair consideration therefor, allowing Nugget to backcharge
11 Spencer Rock for the time, labor and materials associated with that
12 assistance. Indeed, even if Nugget and Spencer Rock had not entered
13 into the Support Agreement, Nugget would be well within its legal
14 right to withhold from Spencer Rock payments for work within the scope
15 of the Material Contract that Nugget had to perform itself:

16 A general contractor may be justified in refusing to make
17 a progress payment to the subcontractor when the latter
18 has failed to substantially perform his contractual
19 obligations entitling him to the payment. See 3A Corbin
20 on Contracts § 708 (1960); see also *id.* § 692 at 273;
21 Restatement (Second) of Contracts § 237, comment d
22 (1981). It follows that the general contractor is
23 entitled to withhold from a progress payment a valid
24 backcharge for work within the scope of the subcontract
25 which the general contractor has had to perform itself.

21 *Howard S. Lease Constr. Co. & Assoc. v. Holly*, 725 P.2d 712, 715-716
22 (Alaska 1986). Considering that North Star is not only familiar with
23 the concept of backcharging, but has itself been party to such
24 agreements in which North Star was backcharged for damages it caused
25 during performance, North Star's objection to the Support Agreement
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1 certainly rings hollow. In short, although North Star may have raised
2 a host of inapposite legal theories and baseless factual allegations
3 in its amended complaint, North Star has never alleged that the
4 Support Agreement was illegal or otherwise void, nor can it as a
5 matter of law.

6 Second, North Star has not identified any statutory or common law
7 duty under Alaska state or federal law that contracts such as the
8 Support Agreement must be disclosed or published for public review.
9 As Nugget has stated time and again, it entered into the Support
10 Agreement with Spencer Rock to ensure that its performance on its
11 contract with the Federal Government would not suffer from anticipated
12 difficulties in Spencer Rock's performance of its contract with
13 Nugget. There was no other purpose. Regardless, even if North Star
14 disputes this fact, whether North Star may have altered its course of
15 performance of its contract with Spencer Rock, if it had knowledge of
16 the Support Agreement, is a moot point. Nugget was not bound by law
17 or by duty to disclose the Support Agreement to anyone;⁸ therefore,
18 North Star may not assert that it detrimentally relied upon Nugget's
19 nondisclosure of the Support Agreement, under any theory.
20 Consequently, in the absence of any genuine issue of material fact,
21 Nugget is entitled to summary judgment as a matter of law on North

22 ⁸ Indeed, if Nugget had disclosed to Spencer Rock's material suppliers the
23 substance of the Support Agreement prior to date Spencer Rock executed its
24 contract with North Star, Nugget may well have exposed itself to suit by
25 Spencer Rock on a theory of tortious interference with contract or economic
relations.

1 Star's promissory estoppel, detrimental reliance, and
 2 misrepresentation and nondisclosure claims.⁹

3 D. Nugget never owed North Star any duty of care, thus, North Star's
 4 negligence claims must fail

5 North Star's negligence claim appears pulled out of thin air:
 6 "Under the circumstances, [Nugget] owed [North Star] . . . a duty of
 7 care, including statutory duties, which [Nugget] breached, legally
 8 causing harm and damages to North Star . . . including nonpayment of
 9 the principal sum due, interest, late payment charges, and attorney
 10 fees." North Star's Amended Complaint, ¶ 34. North Star does not
 11 identify the nature of the supposed duty of care that was allegedly
 12 breached by Nugget or any statute that might support such a theory.

13 Under Alaska law, "[t]he initial step in deciding whether an
 14 action for negligence can be maintained is to consider whether a duty
 15 exists." *Mesiar v. Heckman*, 964 P.2d 445, 448 (Alaska 1998).
 16 "Whether an actionable duty exists is a question of law and public
 17 policy." *Id.* "'Duty' is not sacrosanct in itself, but is only an
 18 expression of the sum total of those considerations of policy which
 19 lead the law to say that the particular plaintiff is entitled to

20 ⁹ It does not matter that North Star understood "that the Homer Project was a
 21 government project of the Army Corps of Engineers and that Nugget and its
 22 surety posted a bond to provide payment for any unpaid goods or services," or
 23 that "[North Star] relied on this understanding as an inducement for [North
 24 Star] to continue performing." North Star's Amended Complaint, ¶ 30.
 25 Despite its insistence to the contrary, the Ninth Circuit previously
 established that North Star, a second-tier vendor, was in error in its
 understanding and may not recover against Nugget simply because the Homer
 Spit Project was a bonded job. Thus, North Star's awareness of Nugget's
 posting of the bond does nothing to support North Star's claims.

1 protection." *Id.* (quoting *City of Kotzebue v. McLean*, 702 P.2d 1309,
 2 1313 (Alaska 1985) and William L. Prosser, *The Law of Torts* § 53, at
 3 325 (4th ed. 1971)). Alaska courts will "first define the class of
 4 cases to which [its] rulings apply, then weigh the factors which
 5 support and oppose the imposition of liability in that class of
 6 cases." *Id.* "In the first phase of duty analysis . . . duty is at
 7 heart a question of policy centering on the basic relationship between
 8 the parties rather than the nature of their conduct on a given
 9 occasion. Particular conduct becomes important only when a duty is
 10 imposed; the conduct then helps to determine the applicable standard
 11 of care." *Id.* (citing W. Page Keeton et al., *Prosser and Keeton on*
 12 *the Law of Torts* § 53, at 356 (5th ed. 1984)). Notably, in
 13 circumstances in which a negligence claim is predicated upon an
 14 inaction or omission, there must be "some definite relation between
 15 the parties, of such a character that social policy justifies the
 16 imposition of a duty to act," or "a special relationship creating that
 17 duty," for negligence liability to attach. *Ballum v. Weinrick's,*
 18 *Inc.*, 633 P.2d 272, 273, 276 (Alaska 1981) (citing W. Prosser, *The Law*
of Torts, § 56 at 339 (4th ed. 1971)).

19 If the court can identify a class of cases to which its ruling
 20 would apply, only then need it turn to the second phase of its
 21 analysis, which involves a weighing of the factors that support and
 22 oppose the imposition of liability:

23 [1] The foreseeability of harm to the plaintiff, [2] the
 24 degree of certainty that the plaintiff suffered injury, [3]
 the closeness of the connection between the defendant's
 25 conduct and the injury suffered, [4] the moral blame

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1 attached to the defendant's conduct, [5] the policy of
2 preventing future harm, [6] the extent of the burden to the
3 defendant and consequences to the community of imposing a
4 duty to exercise care with resulting liability for breach,
5 and [7] the availability, cost and prevalence of insurance
6 for the risk involved.

7 *Kooly v. State*, 958 P.2d 1106, 1108 (Alaska 1998); see also *D.S.W. v.*
8 *Fairbanks North Star Borough School District*, 628 P.2d 554, 555
9 (Alaska 1981).

10 Here, the relationship between Nugget and North Star is one of
11 prime contractor and second-tier vendor. The only connection between
12 Nugget and North Star is that both parties worked on the Homer Spit
13 Project during the same period, a fact that was not brought about by
14 Nugget, and that was entirely dependent upon Mr. LaPore's decision to
15 approach North Star for assistance on the project and North Star's
16 decision to accept Mr. LaPore's invitation. Further, for reasons
17 discussed earlier, there is no privity of contract between Nugget and
18 North Star.

19 This is not the sort of relationship, much less a special
20 relationship that can define a class of cases to which a court could
21 apply a ruling or, specifically, impose a duty under a negligence
22 theory. Such relationships are not bound by any duty under statute or
23 common law, or as a matter of public policy, that gives rise to a
24 cause of action in negligence. North Star has never identified any
25 such duty. In fact, the Alaska Supreme Court has specifically held
that a lack of privity will preclude recovery for pure economic loss
upon a negligence theory, which follows the longstanding and majority
rule in most jurisdictions. See *Smith v. Tyonek Timber, Inc.*, H&S
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1 *Constr., Inc.*, 680 P.2d 1148, 1153-1154 (Alaska 1984); see also
 2 *Moorman Manufacturing Co. v. National Tank Co.*, 435 N.E.2d 443 (Ill.
 3 1982) (cited in *Smith*).¹⁰ The Court should not indulge North Star's
 4 request to impose upon the attenuated relationship between a prime
 5 contractor and second-tier vendor not in privity with one another a
 6 duty that has never before been applied under Alaska (or any) law.
 7 *Cf. State v. Osborne*, 607 P.2d 369, 371 (Alaska 1980) (holding that
 8 homeowner did not owe any duty to carpenter hired by homeowner's
 9 builder when builder failed to compensate carpenter for work on
 10 homeowner's project).

11 Even if there were privity between Nugget and North Star,
 12 recovery of purely economic losses on a theory of negligence would
 13 require a showing that "the defendants knew or reasonably should have
 14 foreseen both that particular plaintiffs or an identifiable class of
 15 plaintiffs were at risk and that ascertainable economic damages would
 16 ensue from the conduct." *Mattingly v. Sheldon Jackson College*, 743
 17 P.2d 356, 360 (Alaska 1987). Here, there is a complete absence of
 18 "conduct" attributable to Nugget that could support the imposition of
 19 a duty; North Star may complain that the circumstances surrounding the
 20 Support Agreement constitute actionable conduct but, as the Alaska
 21 courts, as well as North Star itself, have expressly recognized, there

22 ¹⁰ *Smith* involved a claim by a subcontractor, Smith, against a concrete
 23 supplier, Tyonek, that was selected by the prime contractor, H&S. The court
 24 held, *inter alia*, that "Smith's lack of privity with Tyonek precludes his
 25 recovery for pure economic loss based on a negligence theory." *Smith*, 680
 P.2d at 1154. The same reasoning applies here: because North Star is not in
 privity with Nugget, North Star should be precluded from recovering from
 Nugget for pure economic loss based upon a theory of negligence.

1 is nothing improper about providing support to contractor and then
2 backcharging that contractor for the value of the support. *See Howard*
3 *S. Lease Constr. Co. & Assoc. v. Holly*, 725 P.2d 712, 715-716 (Alaska
4 1986); *Krider Aff.*, Ex. 1, Goodwill Dep., p. 84, lines 10-25, p. 85
5 lines 1-11. Moreover, there is absolutely no way that Nugget could
6 have foreseen that Mr. LaPore would fail to pay Spencer Rock's
7 suppliers, including North Star.

8 It is for these same reasons that the "tortuous walk" through the
9 often-cited factors set forth in *Kooly* would be an exercise in
10 futility, assuming a court determined that the relationship between a
11 Nugget and North Star was sufficiently ascertainable as to apply a
12 ruling. *See Smith*, 680 P.2d at 1153 (describing attempt to apply
13 factors similar to those set forth in *Kooly* in case in which parties
14 lacked privity as "futile"); *Kooly*, 958 P.2d at 1109-1111; *Mattingly*,
15 743 P.2d at 360 (emphasizing "the role of foreseeability as it relates
16 to duty owed and to proximate cause" in adopting rule permitting
17 recovery for purely economic losses). To be sure, attempting to
18 analyze the [1] foreseeability and [2] certainty of North Star's
19 losses would have required an understanding of the motivations
20 underlying Mr. LaPore's decision to breach his agreement with North
21 Star. In the same vein, analyzing: [3] the closeness of the
22 connection between Nugget's conduct and North Star's injury when there
23 was neither a closeness nor a connection; [4] the moral blame attached
24 to Nugget's conduct, when there was no conduct on which to assess
25 moral blame; [5] the policy of preventing future harm when the future

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1 harm cannot be readily ascertained; [6] the burden to Nugget and the
2 consequences to the Alaska contracting community by imposing a duty
3 never before known in the history of contract or tort law, or; [7] the
4 availability, cost and prevalence of insurance for the risk involved
5 when there has never been in fact, and likely never been contemplated,
6 a need for such insurance, would be a futile exercise indeed. See
7 *Kooly*, 958 P.2d at 1108.

8 In light of the foregoing, North Star's bald assertion that
9 Nugget owed North Star a duty of care is not enough to make it so.
10 Moreover, North Star has also failed to cite any federal or state law
11 that imposes a statutory duty between a prime contractor and a second-
12 tier vendor of a supplier to one another. In fact, as the Ninth
13 Circuit held in its first decision, the statutory law is to the
14 contrary. In the absence of any genuine issue of material fact,
15 Nugget is entitled to summary judgment dismissal of North Star's
16 negligence claims as a matter of law.

17 E. North Star is not entitled to any remedy under unjust enrichment
18 and restitution, quantum meruit, equitable subordination or
19 constructive trust because Nugget has not improperly intercepted
20 funds due North Star or otherwise been unjustly enriched

21 North Star also alleges a number of equitable causes of action,
22 including unjust enrichment and restitution, quantum meruit, equitable
23 subordination and constructive trust. At the center of these claims
24 is the allegation that, through the Support Agreement, Nugget
25 improperly exercised its influence over Spencer Rock to intercept and
unjustly retain funds that are due North Star.

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1 The concepts of quasi-contract, unjust enrichment, contract
2 implied-in-law, and quantum meruit are very similar and interrelated;
3 courts generally treat actions brought upon these theories as
4 essentially the same. See *Alaska Sales and Serv., Inc. v. Millet*, 735
5 P.2d 743, 746, fn. 6 (Alaska 1987). The three elements for a quasi-
6 contract or quantum-meruit claim are as follows: 1) a benefit was
7 conferred upon the defendant by the plaintiff; 2) an appreciation by
8 the defendant of such benefit; and 3) acceptance and retention by the
9 defendant of such benefit under such circumstances that it would be
10 inequitable for him to retain it without paying the value thereof.
11 See *Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130, 1143 (Alaska
12 1996). The courts are in accord in stressing that the most
13 significant requirement for recovery in quasi-contract is that the
14 enrichment to the defendant must be unjust; that is, the defendant
15 must receive a true windfall or "something for nothing." *Alaska Sales
and Serv., Inc.*, 735 P.2d at 746.

16 A constructive trust will be ordered to "compel one who unfairly
17 holds a property interest to convey that interest to another to whom
18 it justly belongs. When a court finds that a defendant is the holder
19 of a property interest which he retains by reason of unjust,
20 unconscionable, or unlawful means, it takes such interest from the
21 defendant and vests it in the wronged party. See *McKnight v. Rice,
Hoppner Brown & Brunner*, 678 P.2d 1330, 1335 (Alaska 1984).
22 Similarly, outside of the standard bankruptcy context in which it is
23 typically applied, the doctrine of equitable subordination will apply
24

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1 in order to "undo or offset any inequity in the claim position of a
2 creditor that would produce injustice or unfairness to other
3 creditors." *Nerox Power Systems, Inc. v. M-B Contracting Co., Inc.*,
4 54 P.3d 791, 795 (Alaska 2002) (citations omitted).

5 Here, the undisputed facts establish that Nugget paid Spencer
6 Rock \$197,184.66 and that Nugget sustained losses in excess of \$1.5
7 million in connection with its dealings with Spencer Rock. This is
8 not a situation in which Nugget received a windfall or retained
9 something for nothing, or, specifically, improperly retained money
10 that was due Spencer Rock, which in turn precluded Spencer Rock from
11 discharging its obligation to North Star. Quite to the contrary,
12 Nugget fully and fairly compensated Spencer Rock per the Material
13 Contract as modified by the Support Agreement and, for reasons that
14 are not yet clear, Spencer Rock then blatantly lied to North Star by
15 withholding North Star's payment on the basis that Spencer Rock was
16 never paid by Nugget. There is no principle in equity that would
17 permit North Star to recover money paid by the United States to Nugget
18 that was rightfully earned on the ground that Spencer Rock breached
19 its contract with North Star. If anyone has been unjustly enriched,
20 it is Mr. LaPore and Spencer Rock, whose conduct resulted in the
21 nonpayment of Spencer Rock's suppliers, as well a breach of its
22 contract with Nugget that resulted in Nugget's loss of over \$1.5
23 million dollars.

24 Further, it is well-established under Alaska law that a party to
25 an express contract may not seek recovery on extra-contractual

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1 theories such as quantum meruit or implied contract. *See Mitford v.*
2 *de Lasala*, 666 P.2d 1000, 1006 n.1 (Alaska 1983); *Fairbanks North Star*
3 *Borough v. Kandik Const., Inc. & Assoc.*, 795 P.2d 793, 799 (Alaska
4 1990), *opinion vacated in part on rehearing on other grounds*, 823 P.2d
5 632 (Alaska 1991). Nevertheless, North Star unabashedly seeks to
6 avoid or ignore this rule by attempting to recover from Nugget the
7 very same quantum that is covered by North Star's contract with
8 Spencer Rock.

9 The conclusion that North Star cannot recover under its equitable
10 theories remains true even if North Star should attempt to create a
11 genuine issue of material fact regarding Nugget's intentions behind
12 the execution of the Support Agreement. Regardless of the intent that
13 North Star ascribes to Nugget, the fact would remain that Nugget has
14 not been unjustly enriched, and that Spencer Rock was compensated by
15 Nugget per the Material Contract, as modified by the Support
16 Agreement. To the extent that North Star would contend that Nugget
17 received value for North Star's loading of the barges, such value was
18 wholly offset by Spencer Rock's failure to perform and breach of its
19 contract with Nugget and, consequently, the losses that Nugget
20 sustained therefrom. Accordingly, because there is no genuine issue
21 of material fact Nugget is entitled to summary judgment on North
22 Star's equitable claims.

23 ///

24 ///

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1 F. Nugget and Spencer Rock are distinct entities and Spencer Rock
2 was never vested with any authority to act as Nugget's agent¹¹

3 In support of its agency claim, North Star alleges that Mr.
4 LaPore and Spencer Rock became agents of Nugget through Nugget's
5 "dominion, control and overreaching with respect to Spencer and
6 LaPore's operations and affairs, its indebting Spencer and LaPore, and
7 its interception and rechannleing of funds to itself otherwise owed
8 Spencer and LaPore and [North Star]." North Star's Amended Complaint,
9 ¶ 29. North Star alleges further that "Nugget, through its so-called
10 'support' arrangements and otherwise, overwhelmed, undermined, and
11 effectively took over Spencer and LaPore and took advantage of North
12 Star and its services." *Id.* Not only do these factual allegations
13 fail to support a claim of agency between Nugget and Spencer Rock on
14 their face; these allegations also evidence North Star's fundamental
15 misunderstanding of the governing law regarding the relationship
16 between a principal and its agent.

17 "Under Alaska law, an agency relation exists only if there has
18 been a manifestation of the principal to the agent that the agent may
19 act on his account and consent by the agent so to act." *Harris v.*
20 *Keys*, 948 P.2d 460, 464 (Alaska 1997) (citations omitted) (relying
21 upon, *inter alia*, Restatement (Second) of Agency § 15).

22 ¹¹ It should be noted that the Court previously held that "[t]here are no
23 facts in the record supporting the inference that Spencer acted as an agent
24 of Nugget at the time that Spencer hired North Star, North Star, or [sic]
25 Nugget." *United States of America d/b/a North Star Terminal & Stevedore Co.,*
et al. v. Nugget Construction, Inc., et al., Slip Op. No. A98-0009-CV (filed
Aug. 30, 2002), at 5. The Court further held that: "Nothing in the [Support]
agreement expresses that Nugget and Spencer are joint venturers, partners, or
intended to act as principal and agent." *Id.* at 6.

1 Significantly, "the Restatement's requirement that an agent act 'on
2 the principal's account' should be interpreted as requiring action
3 under the principal's control, rather than merely action which serves
4 the principal's purposes." *Id.* at 465.

5 Further, "in order for an agency relationship to exist, the agent
6 must have 'a power to alter the legal relations between the principal
7 and third persons.'" *Manes v. Coats*, 941 P.2d 120, 123-24 (Alaska
8 1997) (quoting Restatement (Second) of Agency § 12). "The principal,
9 in turn, must have 'the right to control the conduct of the agent with
10 respect to matters entrusted to him.'" *Id.* at 124 (quoting
11 Restatement (Second) of Agency § 14). "If an agency relationship does
12 exist, the 'extent of the duties of the agent to the principal are
13 determined by the terms of the agreement between the parties,
14 interpreted in light of the circumstances under which it is made.'" *Id.*
15 at 124 (quoting Restatement (Second) of Agency § 376).

16 The existence of an agency relationship may be proved by
17 circumstantial evidence that shows a course of dealing between two
18 parties; however, "when an agency relationship is to be proven by
19 circumstantial evidence, the principal must be shown to have consented
20 to the agency since one cannot be the agent of another except by
21 consent of the latter." *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309
22 N.W.2d 285, 290 (Minn. 1981). As between an agent and a supplier,
23 "[o]ne who contracts to acquire property from a third person and
24 convey it to another is the agent of the other only if it is agreed
25 that he is to act primarily for the benefit of the other and not for

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1 himself. *Id.* at 291 (quoting Restatement (Second) of Agency § 14K
2 (1958)). Factors indicating that one is a supplier, rather than an
3 agent, are: "(1) That he is to receive a fixed price for the property
4 irrespective of the price paid by him. This is most important. (2)
5 That he acts in his own name and receives the title to the property
6 which he thereafter is to transfer. (3) That he has an independent
7 business in buying and selling similar property." *Id.* at 291-292
8 (quoting Restatement (Second) of Agency § 14K, Comment a (1958)).

9 The undisputed facts establish that there was never a
10 manifestation on the part of Nugget that Spencer Rock may act on
11 Nugget's account. Certainly, there was never any express agreement
12 between Nugget and Mr. LaPore that Mr. LaPore or Spencer Rock would
13 act as Nugget's agent in the prosecution of Spencer Rock's work under
14 the Material Contract. In fact, the Material Contract, as modified by
15 the Support Agreement, on which North Star so extensively relies,
16 details only a legal, arms-length contractual relationship between two
17 distinct corporate entities and nowhere indicates that Spencer Rock or
18 Mr. LaPore may act on behalf of Nugget or otherwise empowers Spencer
19 Rock or Mr. LaPore to act on Nugget's behalf.

20 Significantly, Mr. Lapore was always at the helm of Spencer
21 Rock's operations and exclusively responsible for Spencer Rock's
22 finances, including during the period in which Nugget was assisting
23 Spencer Rock under the Support Agreement. Nugget's payments for work
24 under the Material Contract were made exclusively to Spencer Rock and
25 never to North Star. Throughout North Star's relationship with

1 Spencer Rock, Nugget never indicated that Nugget would be responsible
2 for Spencer Rock's debts to North Star. Mr. Lapore alone decided the
3 companies, including North Star, with which he would enter into
4 contracts, not Nugget. Mr. Lapore alone decided the means by which
5 Spencer Rock would be financed to facilitate Spencer Rock's
6 performance, not Nugget. Mr. Lapore alone was the sole beneficiary of
7 North Star's extension of credit, which Mr. LaPore failed to honor,
8 violating not only Spencer Rock's agreement with North Star but also
9 Mr. LaPore's personal guarantee to honor Spencer Rock's obligations to
10 North Star. And perhaps most significant, Mr. Lapore alone determined
11 that he would retain the \$197,184.66 that Nugget paid Spencer Rock
12 rather than disburse from those funds the amount that Spencer Rock
13 owed North Star for North Star's work under its contract with Spencer
14 Rock. Based on the guidance in the Restatement and the relevant
15 caselaw, these facts and circumstances describe a relationship between
16 Nugget and Spencer Rock as buyer-supplier, and not principal-agent.
17 *See, e.g., M.S.P. Indus., Inc. v. Diversified Mortgage Servs., Inc.,*
18 *777 P.2d 237 (Colo. App. 1989) (finding absence of agency relationship*
19 *under circumstances similar to the relationship between Nugget and*
20 *Spencer Rock).*

21 This is consistent with the clear record, which establishes that
22 North Star understood that its payment was to come from Spencer Rock
23 alone, and that the relationship between Nugget and Spencer Rock was
24 one of two separate and independent companies in contract with one
25 another, and not a relationship between principal and agent. *See*

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1 Krider Aff., Ex. 1, 1998 Goodwill Aff., ¶ 4, attached as Ex. 5 to
 2 Goodwill Dep. ("Mr. LaPore informed me that Nugget Construction had
 3 obtained the award of contract from the federal government. He told
 4 me that he and his company, Spencer Rock Products, would be supplying
 5 rock for the job."); Krider Aff., Ex. 2, Letter from Jack Goodwill to
 6 Dave Scott and Doug Wood, Aug. 4, 1997, attached as Ex. 14 to 2005
 7 Bentz Dep. ("[North Star] has been working for Spencer Rock Products,
 8 Inc. From May 1 to June 26, 1997. . . . No payment has been received
 9 from Spencer Rock for loading the barges. Mr. Bob LaPore . . . has
 10 stated that he would pay [North Star] after he receives payment from
 11 Nugget.").

12 Even in the absence of the foregoing, which unequivocally
 13 establishes that Spencer Rock was never Nugget's agent, North Star
 14 would still not be able to recover from Nugget on a theory of agency
 15 because, under Alaska law, an undisclosed principal is not be liable
 16 for the acts of its agent.¹² See *Jensen v. Alaska Valuation Serv.,*
 17 *Inc.*, 688 P.2d 161, 162-63 (Alaska 1984). Although an agent will not
 18 liable if the principal is disclosed to a third party, when the
 19 principal is not disclosed, liability rests on the agent, not the
 20 principal. See *Vienna v. Scott Wetzel Servs., Inc.*, 740 P.2d 447, 452
 21 (Alaska 1987). Thus, to the extent that North Star's agency claim is
 22 predicated upon Nugget's or Mr. LaPore's nondisclosure of the Support

23 ¹² This conclusion is entirely consistent with the Court's prior findings in
 24 this case. See *United States ex rel. North Star Terminal & Stevedore Co., et*
 25 *al. v. Nugget Construction, Inc., et al.*, Slip Op. No. A98-0009-CV (filed
 Aug. 30, 2002), at 24, n. 38.

1 Agreement, such claim would be squarely foreclosed by North Star's
2 contemporaneous and accurate understanding that Spencer Rock and
3 LaPore were never agents of Nugget, and that (as one would expect) no
4 one informed North Star to the contrary.

5 In sum, there was never an agency relationship between Nugget and
6 Spencer Rock, which is consistent not only with the facts and
7 circumstances surrounding the relationship between Nugget and Spencer
8 Rock, but also North Star's understanding of its relationship to
9 Nugget and Spencer Rock. Beyond its empty allegations, North Star has
10 not alleged a single fact to support its claim that Nugget vested
11 Spencer Rock or Mr. LaPore with the necessary authority to act as
12 Nugget's agent, or that Mr. LaPore ceded control or responsibility of
13 Spencer Rock to Nugget in such a way as to sustain a claim that
14 Spencer Rock became Nugget's agent. Notably, the Support Agreement
15 memorialized an arrangement between Nugget and Spencer Rock in which
16 the parties in effect agreed to modify the Material Contract such that
17 Nugget would be fairly compensated for its assistance to Spencer Rock,
18 nothing more.

19 Accordingly, in the absence of any genuine issue of material
20 fact, Nugget is entitled to summary judgment as a matter of law that
21 neither Spencer Rock nor Mr. LaPore acted as Nugget's agent.

22 G. Punitive damages are not only inappropriate but, also,
23 unallowable

24 Under Alaska law, punitive damages serve two purposes: "to
25 punish the wrongdoer and to deter the wrongdoer and others like him
from repeating the offensive act." *State Farm Mut. Auto. Ins. Co. v.*

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1 Weiford, 831 P.2d 1264, 1266 (Alaska 1992) (citation omitted). The
2 availability of such damages "turn[s] on the wrongdoer's motive, state
3 of mind, and degree of culpability." *Alyeska Pipeline Serv. Co. v.*
4 *O'Kelley*, 645 P.2d 767, 774 (Alaska 1982). Punitive damages are a
5 harsh remedy "not favored in law. They are to be allowed only with
6 caution and within narrow limits." *State Farm*, 831 P.2d at 1266;
7 *Alyeska Pipeline Serv. Co. v. Beadles*, 731 P.2d 572, 574 (Alaska
8 1987).

9 A plaintiff seeking punitive damages must "prove by clear and
10 convincing evidence that the defendant's conduct was outrageous, such
11 as acts done with malice, bad motive, or reckless indifference to the
12 interests of another." *Lee Houston & Assocs. v. Racine*, 806 P.2d 848,
13 856 (Alaska 1991). A showing of actual malice is not required, *Sturm,*
14 *Ruger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *cert. denied*, 454
15 U.S. 894, (1981), *overruled on other grounds*, *Dura Corp. v. Harned*,
16 703 P.2d 396 (Alaska 1985)); however, the plaintiff must establish, at
17 a minimum, that the defendant's conduct "amounted to reckless
18 indifference to the rights of others, and conscious action in
19 deliberate disregard of [those rights]." *State v. Haley*, 687 P.2d
20 305, 320 (Alaska 1984) (quoting *Sturm*, 594 P.2d at 47); *see also*
21 *State Farm*, 831 P.2d at 1266 ("Malice may be inferred if the acts
22 exhibit 'a callous disregard for the rights of others.'" (quoting
23 *Alyeska Pipeline Serv. Co.*, 645 P.2d at 774); *Hayes v. Xerox Corp.*,
24 718 P.2d 929, 934-35 (Alaska 1986) ("Conscious action in 'deliberate
25

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1 disregard of [others] ... may provide the necessary state of mind to
2 justify punitive damages.'" (citation omitted).

3 Even if it is proven that wrongdoing was intentionally committed,
4 this mere fact alone is not enough to sustain an award of punitive
5 damages. See *Alyeska Pipeline Serv. Co.*, 645 P.2d at 773-74. "By
6 their very nature, such damages turn on the wrongdoer's motive, state
7 of mind, and degree of culpability, rather than the particular tort
8 committed." *Id.* (citing K. Redden, *Punitive Damages* § 4.2 (1980)).

9 Whether malice is present is a question of fact, and the trier of
10 fact is given broad discretion to grant or withhold punitive damages.
11 See *Haskins v. Sheldon*, 558 P.2d 487, 494 (Alaska 1976); *Schafer v.*
12 *Schnabel*, 494 P.2d 802, 805 (Alaska 1972). "But where there is no
13 evidence that gives rise to an inference of actual malice or conduct
14 sufficiently outrageous to be deemed equivalent to actual malice, the
15 trial court need not submit the punitive damages issue to the jury.
16 Indeed, submitting the issue to the jury in such a situation may
17 constitute reversible error." *Alyeska Pipeline Serv. Co.*, 645 P.2d at
18 774.

19 North Star boldly alleges that it is entitled to \$1,000,000 in
20 punitive damages - an amount staggeringly disproportionate to North
21 Star's prayer for \$124.724.98 in actual damages - from "each of the
22 defendants," and "especially Nugget." North Star's Amended Complaint,
23 ¶ 39. Yet, North Star has not offered any fact that would "prove by
24 clear and convincing evidence that [Nugget's] conduct was outrageous,
25 such as acts done with malice, bad motive, or reckless indifference to

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1 the interests of another." *Lee Houston & Assocs.*, 806 P.2d at 856.
2 Nugget entered into an arms-length agreement with Spencer Rock, the
3 purpose and terms of which are clear from the face of the document,
4 and then conducted itself consistent with that agreement.

5 Like Shoreside and Metco, North Star entered into its agreement
6 with Spencer Rock upon the understanding that it would be protected by
7 Nugget's bond. From there grew trumped-up allegations of conspiracy,
8 despite legitimate backcharges for the work that either Spencer did
9 not perform or performed poorly under its contract with Nugget, and
10 despite the fact that North Star itself has been party to such
11 backcharging arrangements. Aside from North Star's inventions and
12 unsupported allegations, this is a record absent any factual
13 allegation, much less clear and convincing evidence, of outrageous
14 conduct, or conduct recklessly indifferent to North Star's interests.
15 Rather, there is only the unfounded belief that Nugget had an
16 obligation to pay North Star for its work under contract with Spencer
17 Rock. *Id.* In fact and at law, Nugget bears no such responsibility;
18 the discharge of Spencer Rock's debts to North Star is a
19 responsibility that Spencer Rock bears alone.

20 Conclusion

21 North Star is certainly within its rights to pursue payment for
22 the work it performed on the Project. North Star refuses to
23 acknowledge, however, that it should not be pointing its finger in
24 Nugget's direction; rather it should be pointing at Mr. LaPore and
25 Spencer Rock. The undisputed facts demonstrate that North Star never

1 relied to its detriment on any act or omission of Nugget in entering
2 into and performing its contract with Spencer Rock, as well as that
3 Nugget sits similarly situated to North Star, in that Nugget also
4 sustained significant financial losses as a result of its dealings
5 with Spencer Rock.

6 North Star may have once occupied a sympathetic position, but
7 this position has since been overshadowed by North Star's overtly
8 opportunistic conduct in these proceedings. There can be only one
9 reason why North Star's current state law claims were not raised back
10 in 1998, which is that North Star knew then, as it knows now, that
11 such claims were groundless. The testimony of North Star's corporate
12 designee tells the same story: despite the Ninth Circuit's prior
13 ruling, North Star nevertheless clutches to the belief that Nugget is
14 liable to North Star simply because the Homer Spit Project was a
15 bonded job. Rather than accept the law of the case and redirect its
16 efforts toward more constructive ends, North Star instead alleges
17 unsupported facts on which to posit inapposite theories, while also
18 attempting to grossly inflate its recovery with allegations of
19 outrageous conduct and reckless indifference that have no place in
20 these proceedings whatsoever.

21 North Star has had its day in court and lost when Spencer was
22 determined to be a supplier. North Star may have another opportunity
23 to prove yet another lately-conceived and alternative theory of
24 recovery under the federal Miller Act. North Star's state law claims,
25 however, are clearly not burdened by any genuine issues of material

1 fact; as such, for the reasons stated herein, Nugget is entitled to
2 summary judgment as a matter of law.

3 Dated: April 28, 2006

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